No. 76-1316

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANK S. BEAL, ET AL., PETITIONERS

v.

RAYMOND J. BRODERICK, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

FRANK D. ALLEN, JR.,
JOHN C. HOYLE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ORDER BELOW

The order of the court of appeals dismissing, without opinion, the petition for a writ of mandamus or prohibition (Pet. App. 78a) is unreported.

JURISDICTION

The order of the court of appeals was entered on December 23, 1976. The petition for a writ of certiorari was filed on March 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in dismissing a petition for a writ of mandamus or prohibition which

sought to vacate orders of the district court permitting the United States to intervene in a civil rights suit alleging severe and widespread deprivations of the constitutional rights of mentally retarded persons committed to the Pennhurst State School and Hospital.

STATEMENT

Petitioners[1] seek review of the denial by the court of appeals of their "Petition For A Writ Of Mandamus Or, In The Alternative, For A Writ Of Prohibition." The petition sought to obtain the dismissal of the United States as a plaintiff-intervenor in *Halderman* v. *Pennhurst State School and Hospital,* E.D. Pa., C.A. No. 74-1345 (Pet. App. 68a, 75a-76a).

The mother and legal guardian of plaintiff Terri Lee Halderman, a resident of Pennhurst State School and Hospital (an institution for the retarded with an enrollment of more than 1600 persons), initiated this action on May 30, 1974, seeking injunctive and declaratory relief and damages for injuries which plaintiff suffered and continues to suffer during her commitment to Pennhurst (Pet. App. 1a-25a). The suit was certified as a class action (Pet. App. 61a-62a).[2]

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[1]Petitioners are the Secretary of the Pennsylvania Department of Public Welfare, other officials of that Department, the superintendent and other officials and employees of the Pennhurst State School and Hospital, as well as the Department of Public Welfare of the Commonwealth of Pennsylvania and the Pennhurst State School and Hospital.

[2]The class was defined as "persons resident at Pennhurst State School and Hospital, persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties who are on a waiting list for placement at Pennhurst State School and Hospital, and persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties who, because of the unavailability of alternate services in the community, may be placed at the Pennhurst State School and Hospital" (Pet. App. 62a).

Suit was brought under 28 U.S.C. 1331, 1343, and 42 U.S.C. 1983, 1985, 1986, 1988, 2201 and 2202; the complaint alleged that Halderman and members of her class suffer "deprivation and denial of their constitutional, statutory and common law right to treatment, and a deprivation and denial of their constitutional right to the least restrictive conditions necessary to achieve the purposes of commitment, right to refuse treatment, right to be free from Cruel and Unusual Punishment, right to Due Process of Law and right to the Equal Protection of the Laws" (Pet. App. 3a-4a).[3]

In November 1974, the United States moved, pursuant to Rule 24(a) and (b), Fed. R. Civ. P., to intervene as a plaintiff (Pet. App. 26a-27a, 38a, 55a-56a). The complaint in intervention alleged (Pet. App. 41a):

> The proper treatment and habilitation of mentally retarded individuals is a matter of direct concern to the United States, as evidenced by a Presidential Statement on Mental Retardation, dated October 11, 1974, and Congressional enactments such as

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[3]The complaint emphasizes the institution's inadequate staffing, facilities and supervision, and cites 40 reported injuries to plaintiff Halderman between March 1966 and November 1973 resulting from these inadequacies. These injuries include numerous scratches and lacerations, three bites (two identified as inflicted by another resident), and several fractures (including one broken toe resulting from going barefoot due to a shortage of shoelaces and one broken jaw resulting from a fall while wandering about the sleeping area at night in a straightjacket) (Pet. App. 10a-16a). It also cited the administration of sedative drugs and the use of physical restraints for the convenience of staff members, as well as inadequate feeding, training, clothing and hygienic care (Pet. App. 16a-19a). It alleged that the physical and emotional condition of plaintiff Halderman and the members of the class has substantially deteriorated since admission to Pennhurst, due to the environment provided by petitioners (Pet. App. 17a).

> Sections 1905(c) and (d) of Title XIX of the Social Security Act, as amended (42 U.S.C. 1396(c) and (d)), the Education of the Handicapped Act (20 U.S.C. 1401 *et seq.*), and the Developmental Disabilities and Facilities Construction Act (42 U.S.C. 2661-2666, 2620-2677c).

In its memorandum in support of the motion to intervene, the federal interest was further explained (Pet. App. 30a):

> The United States has a direct, substantial and legally protectable interest in vindicating the constitutional rights of residents confined to the Pennhurst State School and Hospital. The United States has an interest in the improvement of mental health and mental retardation facilities, the maintenance of adequate training for professional personnel, and the administration of proper treatment for mentally disabled persons. Large sums of federal money are expended annually in the area of mental health care under such programs as Medicaid, 42 U.S.C. 1396 et seq., Medicare, 42 U.S.C. 1395 et seq., and the Community Mental Health Centers Act, 42 U.S.C. 2681 et seq.

Petitioners estimate that more than a quarter of Pennhurst's total budget is funded by the federal government under Medicaid (Pet. 12).

The United States sought an injunctive order to prevent defendants from engaging in such acts and practices "to the immediate and irreparable injury of the residents of the Pennhurst State School and Hospital and in derogation of federal policy and the national interest" (Pet. App. 41a).

On January 17, 1975, the district court, without opinion, granted the motion of the United States to intervene.

(Pet. App. 57a). Petitioners moved to dismiss the United States as plaintiff-intervenor on the ground that the United States lacked standing (Pet. App. 58a). On November 29, 1976, the district court denied this motion (Pet. App. 60a). Petitioners then sought, pursuant to 28 U.S.C. 1292(b), certification of the question to the court of appeals and a stay of further participation of the United States pending the requested interlocutory appeal (Pet. App. 64a-66a). The district court denied both requests (Pet. App. 67a).[4]

Petitioners sought a writ of mandamus or, in the alternative, a writ of prohibition from the court of appeals on December 20, 1976 (Pet. App. 68a-77a). On December 23, 1976, the court of appeals, without opinion, dismissed the petition for the writ (Pet. App. [redacted]. 78a).[5]

ARGUMENT

The court of appeals correctly dismissed the petition for a writ of mandamus or, in the alternative, pro-

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[4]The district court ordered a bifurcated trial, with the first phase devoted to the issue of liability; issues relating to available remedies will be considered later, if necessary. The trial began on April 18, 1977. The plaintiffs and the United States have presented substantially all of their evidence relating to liability, and expect to rest shortly.

[5]Petitioners have applied to this Court for a stay of the United States' participation in the district court proceeding pending action on this petition for certiorari. Their application was denied by Mr. Justice Brennan on April 11, 1977, for failure to comply with Rule 51(2) of the Rules of this Court (requiring a showing that an application for the relief sought has first been made to the court below). After the court of appeals also denied a stay application on April 15, 1977, Mr. Justice Brennan again denied the application on April 19, 1977. On April 20, 1977, petitioners asked that their application be referred to Mr. Justice Rehnquist, who then referred the application to the full Court. Our response to that application is being filed with this brief.

hibition. This case presents no occasion for the exercise of those remedies, which are reserved for "really extraordinary causes." *Will* v. *United States*, 389 U.S. 90, 107; *Ex parte Fahey*, 332 U.S. 258, 259-260. Moreover, there is no conflict in the circuits; the only other court of appeals to consider the question presented here reached the same result as the court below. *In re Estelle*, 516 F. 2d 480 (C.A. 5), certiorari denied *sub nom. Estelle* v. *Justice*, 426 U.S. 925.[6] There is, accordingly, no need for further review by this Court.

Congress established a strong policy against piecemeal review in 28 U.S.C. 1291, which limits the court of appeals to review of final judgments. This policy is subject to carefully limited exceptions, which are not applicable, or were not invoked, in this case.[7] Petitioners cannot avoid this firm rule of finality by seeking review of interlocutory orders under the guise of mandamus. That

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[6]Indeed, several of the factors found troubling by the Justices who dissented from the denial of certiorari in *Estelle* are absent here. The United States did not here seek to add additional parties defendant to the suit or to enlarge the relief sought. Compare Pet. App. 5a-7a and 25a, with Pet. App. 38a and 41a-42a; cf. 426 U.S. at 927. Moreover, the fact that Pennhurst is partially supported by federal funds provides an even more substantial basis for the federal interest in assuring that the institution does not deprive citizens of their constitutional rights than was evident in *Estelle*. Cf. 426 U.S. at 928-929.

[7]The district court denied petitioners' request for certification for an interlocutory appeal under 28 U.S.C. 1292(b); accordingly no appellate jurisdiction exists under that Section. *United States* v. *687.30 Acres of Land*, 451 F. 2d 667 (C.A. 8), certiorari denied *sub nom. Winnebago Tribe of Nebraska* v. *United States*, 405 U.S. 1026; *Van Hoomissen* v. *Xerox Corp.*, 497 F. 2d 180 (C.A. 9). Petitioners have not sought to notice an appeal under any of the carefully limited exceptions to the final judgment rule contained in 28 U.S.C. 1292(a) or the doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546. In any event, none of those exceptions are applicable here.

writ is neither a substitute for appeal nor a device to control the exercise of discretion by the district courts. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383. The legal basis for permitting intervention may not be challenged before appeal from the final judgment, because such orders are "inherently interlocutory since they [do] not terminate any phase of the litigation." *Equal Employment Opportunity Commission* v. *American Telephone and Telegraph Co.*, 506 F. 2d 735, 742 (C.A. 3); *In re Estelle, supra; Roach* v. *Churchman*, 457 F. 2d 1101 (C.A. 8); *Van Hoomissen* v. *Xerox Corp.*, 497 F. 2d 180 (C.A. 9). The proper remedy for review of such an order is appeal from the final judgment. See, *e.g.*, *Securities and Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U.S. 434, *In re Estelle, supra*, 516 F. 2d at 484, *Stell* v. *Savannah-Chatham County Bd. of Educ.*, 333 F. 2d 55 (C.A. 5), certiorari denied *sub nom. Roberts* v. *Stell*, 379 U.S. 933.[8]

Petitioners, nevertheless, assert four reasons for invoking the extraordinary remedy of mandamus: (1) "The United States has absolutely no legally cognizable interest which it seeks to protect by intervening in the *Halderman* case" (Pet. 12); (2) "[i]n this case it is probable that the issue of the United States' standing or authority to proceed against the petitioners will evade appellate review" (Pet. 14); (3) the questions raised are "of great magnitude involving the delicate area of federal-state relations" (Pet. 16); and (4) petitioners will suffer irreparable harm if mandamus is not granted (*ibid.*). None of these reasons warrants granting the writ here.

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[8]Even were the appeal timely, the general rule is that "the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court." *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 506.

1. The interest of the United States in stopping widespread and severe deprivations of constitutional rights of mentally retarded persons in a federally funded institution is substantial and supports the district court's decision permitting the United States to intervene.[9]

Large sums of federal money are expended annually for the care of mentally handicapped citizens under such programs as Medicaid, 42 U.S.C. 1396, *et seq.*; Medicare, 42 U.S.C. 1395, *et seq.*; and the Community Mental Health Centers Act, 77 Stat. 290, as amended, 42 U.S.C. 2681, *et seq.* Indeed, petitioners estimate that more than a quarter of the total Pennhurst budget is received from the federal government under Medicaid (Pet. 12). Congress has required adequate treatment for the mentally retarded as a condition of receiving federal funds. See, *e.g.*, Title XIX, Social Security Act, 49 Stat. 620, as amended and added, 85 Stat. 809, 42 U.S.C. (Supp. V) 1396d(c) and (d); Cf. *King* v. *Smith*, 392 U.S. 309; *United States* v. *San Francisco*, 310 U.S. 16.

Petitioners suggest (Pet. 12-13) that the only means by which that requirement may be enforced is the one specifically authorized by statute—the termination of the flow of federal funds available to assist the States in meeting the needs of mentally retarded individuals. Surely, the Executive Branch is better fulfilling its duties to "take

[9]The United States sought intervention under Rule 24(a), Fed. R. Civ. P. (intervention of right) and under Rule 24(b), Fed. R. Civ. P. (permissive intervention). In granting the United States' motion to intervene, the district court did not specify the Section under which it was acting. In such a situation, the district court's ruling is sustained if either section is satisfied. *Nuesse* v. *Camp*, 385 F. 2d 694 (C.A. D.C.). While the requirements for intervention under the two Sections differ (see Pet. 7-8), the petition makes no argument based on that difference; in any event, the interest of the United States described in the following text is sufficient to satisfy the requirements of either Section.

Care that the Laws be faithfully executed," United States Constitution, Article II, Section 3, see *In re Neagle*, 135 U.S. 1, 63-67, by participating in a suit to secure the constitutional rights of individuals residing in a federally funded institution than it would be terminating federal funds, thereby decreasing the resources available to help the individuals for whose benefit Congress enacted the legislation. The failure of Congress explicitly to authorize intervention by the United States in such a case should not be construed to imply a denial of the authority to act in matters so vitally affecting the interests and policy of the United States. See *United States* v. *California*, 332 U.S. 19, 27-28.

The national policy in favor of securing the rights of the mentally retarded, particularly those who are in institutions, is well established and recognized by all three branches of government. Federal courts have acted to protect those rights in numerous cases. See, *e.g.*, *Wyatt* v. *Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala.), affirmed *sub nom. Wyatt* v. *Aderholt*, 503 F. 2d 1305 (C.A. 5); *New York State Ass'n For Retard. Ch., Inc.* v. *Carey*, 393 F. Supp. 715 (E.D. N.Y.); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn.). Congress has enacted legislation endeavoring to protect the rights and improve the conditions of the mentally retarded.

See, *e.g.*, the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. 94-103, 89 Stat. 496, 42 U.S.C. (Supp. V) 6001-6081;[10] Title XIX, Social Security Act, as amended and added. 42 U.S.C. (Supp. V) 1396d(c) and (d); and the Education of the Handicapped Act, 84 Stat. 175, *et seq.*, 20 U.S.C. 1401, *et seq*. The President has also recognized "the need to assure those who are retarded their full status as citizens under the law," Executive Order No. 11776, March 28, 1974, 39 Fed. Reg. 11865, and has directed "that the Department of Justice take steps to strengthen the assurance of full legal rights for the retarded." President's Statement on Mental Retardation, November 16, 1971, 7 Weekly Compilation of Presidential Documents, 1530 (1971).

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[10]Section 6010 provides, in part (emphasis added):

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.
>
> (3) The Federal Government and the States both have an obligation to assure that *public funds* are not provided to any institutional or other residential program for persons with developmental disabilities that—
>
> (A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

Rule 24(b) provides for permissive intervention when the applicant's claim and the main action have a common question of law or fact. The federal government is responsible for enforcing 18 U.S.C. 241 and 242, the criminal counterparts of 42 U.S.C. 1983, upon which plaintiff Halderman's claim is based. These criminal sanctions, requiring high standards of proof (see, *e.g.*, *Screws* v. *United States*, 325 U.S. 91), do not provide an adequate means of securing prompt correction of the wide-scale abuses alleged in this case, and, thus, the United States may resort to civil litigation to seek a remedy that will ensure the full effectuation of the civil rights of individuals that the criminal statutes are intended to protect. *Wyandotte Co.* v. *United States*, 389 U.S. 191; see also *United States* v. *Republic Steel Corp.*, 362 U.S. 482;

> (B) does not meet the following minimum standards:
>
> (i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.
>
> (ii) Provision to such persons of appropriate and sufficient medical and dental services.
>
> (iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.
>
> (iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation of such persons.
>
> (v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.
>
> (vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

Texas & Pacific Ry. v. *Rigsby*, 241 U.S. 33; *J. I. Case Co.* v. *Borak*, 377 U.S. 426. That right to resort to civil litigation constitutes a claim involving questions of law and fact common to the claim asserted by the private plaintiffs in *Halderman*.[11]

2. Contrary to petitioners' contention (Pet. 14-15) there is no substantial likelihood that the question of the United States' standing or authority to participate in this case will evade appellate review. The United States would be an appellee in any appeal notice by petitioners, and petitioners could specifically challenge the United States' intervention at that time. If the United States

[11]Petitioners rely primarily (Pet. 13-14) on *United States* v. *Solomon*, 419 F. Supp. 358 (D. Md.), appeal pending, for support for their assertion that the United States has no interest in participating in this litigation. *Solomon*, a district court decision from which the United States has appealed, is unlike the present case because it does not involve mandamus and because the issue there is whether the United States could initiate a lawsuit rather than, as here, participate in a case that was initiated by other parties. In addition, to the extent *Solomon* indicates that the United States has no standing to initiate a lawsuit to protect the rights of mentally handicapped citizens, and, for that reason, cannot assert a "claim" cognizable under Rule 24(b), the decision is contrary to the great weight of authority. Many district courts have permitted the United States to intervene in suits seeking to protect the rights of mentally handicapped citizens. See, *e.g.*, *Horacek* v. *Exon*, 357 F. Supp. 71 (D. Neb.); *Alexander* v. *Hall*, 64 F.R.D. 152 (D. S.C.); *North Carolina Association for Retarded Children* v. *State of North Carolina*, 420 F. Supp. 451 (M.D. N.C.); *Stamus* v. *Leon Hardt*, 414 F. Supp. 439 (S.D. Iowa); *Gary W. & United States* v. *Stewart*, C.A. No. 74-2412-C, E.D. La.; *Stockton & United States* v. *Alabama Industrial School*, C.A. No. 2834-N, M.D. Ala.; *Rone & United States* v. *Fireman*, C.A. No. 75-35A, N.D. Ohio; *Evans* v. *Washington*, C.A. No. 76-0293, D. D.C.; *Santana & United States* v. *Rios*, C.A. No. 75-1187, D. Puerto Rico.

or the original plaintiffs appeal, petitioners may challenge the United States' intervention by a timely cross - appeal under Fed. R. App. P. 4(a). See Wright and Miller, *Federal Practice and Procedure: Civil*, §1923 (1972).

3. Finally, withholding appellate review of this issue until appeal from final judgment will not, contrary to petitioners' contention (Pet. 16-17), result in irreparable harm to them. The harm of which petitioners principally complain is a result of the suit itself, not of the intervention by the United States. Even if the United States were denied the right to intervene as a result of an interlocutory appeal, the suit brought by the private parties would continue, and the potential liability of the individual petitioners as well as the risk that minimal treatment standards may be imposed, would remain.

Petitioners also complain (Pet. 17) about the "overwhelming litigation strategy of the federal government," but they have not shown that the United States is pursuing anything other than proper avenues for the conclusion of this litigation that are also available to private plaintiffs.[13] Such complaints should be made to the trial court, not to this Court as a reason for invoking mandamus. See *In re Estelle, supra*, 516 F. 2d at 484.[14]

[13]In any event, an interlocutory appeal at this time should not affect the extent of discovery to which petitioners are subject, since the presentation of the government's case at trial is substantially completed.

[14]Petitioners also give as a reason for invoking mandamus that the questions here "are of great magnitude involving the delicate area of federal-state relations" (Pet. 16). They make no further argument why this reason justifies the issuance of the writ in this case, and standing alone it does not warrant this Court's granting the petition. Cf. *Estelle, supra*, 426 U.S. at 930.

In sum, there is no reason here to depart from the established modes for review of interlocutory orders, such as the one in question, and thus no justification for the use of the extraordinary remedy of mandamus to interfere with the trial court's decision to permit the United States to participate in this litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

FRANK D. ALLEN, JR.,
JOHN C. HOYLE,
Attorneys.

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